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## Evidence--Admissibility of Actions in Refusing to Submit to Compulsory Chemical Tests

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### **Evidence—Admissibility of Actions in Refusing to Submit to Compulsory Chemical Tests**

Esperti was taken into police custody under an indictment of murder and was advised by police that he would be given a nitrate test to determine whether he had recently fired a gun. Esperti's attorney demanded that the police obtain a search warrant before administering the nitrate test and advised his client to voluntarily undergo the test if the search warrant was produced. Following the attorney's departure, the police attempted to administer the test. Esperti resisted and attempted to outwit the test by rubbing his hands with cigarette ashes which also would account for the presence of nitrates. The police overpowered Esperti and forcibly administered the test.

At his trial, Esperti sought to suppress both the chemical test results and any testimony concerning his resistance to the administration of the test. The court denied Esperti's motion to suppress the results of the test, but granted the motion as to any evidence of defendant's resistance thereto. The state appealed the latter portion of the court's ruling. *Held*, reversed. The appellate court assumed that the trial judge was correct in allowing the test results to be submitted as evidence, and, therefore, Esperti's refusal to take the test and the facts and circumstances surrounding such refusal are admissible as circumstances from which a consciousness of guilt might be inferred. Defendant's acts, unless explained, are prima facie evidence of consciousness of guilt and, therefore, relevant to the case. The Florida court followed the general rule that such evidence is admissible if the scientific test itself is both admissible and compulsory. *State v. Esperti*, 220 So. 2d 416 (Fla. 1969).

No West Virginia cases are directly in point with the *Esperti* case although there is an indication that West Virginia would follow the decision. The result in the *Esperti* case was based on the similarity between the nitrate test and the blood test for alcoholic content and on the compulsory requirement that the suspect take the test. Since West Virginia motor vehicle operators are required by statute, W. VA. CODE ch. 17C, art. 5 A, § 1 (Michie 1966), to submit to a blood, breath, or urine test after arrest, a suspect's actions in resisting compulsory tests might be admitted into evidence by West Virginia courts.